Editor's note: Reconsideration denied and previous decision affirmed by decision -- See 111 IBLA 53 (Sept. 20, 1989); appeal filed, Civ. No. A98-0068 (D. Alaska March 4, 1998); dismissed, Oct. 30, 1998; order of dismissal withdrawn, dismissed after reconsideration, Dec. 7, 1998

IRA WASSILLIE

IBLA 84-758 Decided July 19, 1988

Appeal from a decision of Administrative Law Judge E. Kendall Clarke rejecting Native allotment application AA-6270.

Motion to remand denied; Administrative Law Judge decision affirmed.

1. Administrative Procedure: Adjudication--Alaska: Native Allotments--Appeals:Generally--Board of Land Appeals--Rules of Practice: Appeals: Dismissal--Rules of Practice: Private Contests

   Where an Administrative Law Judge decides after a hearing that a Native allotment applicant is not entitled to the lands applied for, the Board will not approve a settlement agreement under which a portion of those lands would be conveyed to the applicant without a de novo review of the record to determine whether the Administrative Law Judge's decision is correct.

2. Alaska: Native Allotments--Alaska: Possessory Rights

   Where evidence at a hearing demonstrates an applicant for a Native allotment used the lands claimed in common with other Natives and ceased using them in a manner that left visible evidence thereof before filing his application, an Administrative Law Judge decision rejecting the application will be affirmed.

APPEARANCES: Tred R. Eyerly, Esq., Anchorage, Alaska, for appellant; Barbara L. Malchik, Esq., and Lance B. Nelson, Esq., Office of the Attorney General, State of Alaska, Anchorage, Alaska, for the State of Alaska; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

I. Introduction and Procedural Background

On April l4, l97l, Ira Wassillie filed a Native allotment application for approximately l40 acres of unsurveyed land situated in protracted

sec. 26, T. 6 S., R. 37 W., Seward Meridian, Alaska, on the north shore of Lake Iliamna along the Lower Talarik Creek and lagoon, pursuant to section l of the Act of May l7, l906, as amended, 43 U.S.C. | 270-l (l970) (repealed, subject to applications pending on December l8, l97l, by section l8(a) of the Alaska Native Claims Settlement Act, 43 U.S.C. | l6l7(a) (l982)). Appellant's application claimed year-round use and occupancy of the land since l940 for the purposes of hunting, trapping, and fishing, and the construction of certain improvements, specifically, a l0- by l2-foot tent frame in l940, a l2- by l8-foot log cabin in l942, and a fish rack in l943. 1/ The application also stated that l2 dogs had been kept on the land from l940 to November l970. Under the "Remarks" section of the application, appellant stated: "I have used this land since l940 seasonally for hunting, fishing, and trapping, for subsistence purpose[s] and my permanent home is in Newhalen, Alaska."

Section l of the Act of May l7, l906, authorizes the Secretary of the Interior "in his discretion and under such rules as he may prescribe" to allot up to l60 acres of vacant, unappropriated, and unreserved nonmineral land to a Native Alaskan who is head of a family or 2l years of age. 43 U.S.C. | 270-l (l970). The principal statutory prerequisite for proving entitlement to an allotment is that the claimant must submit satisfactory proof "of substantially continuous use and occupancy of the land for a period of five years." 43 U.S.C. | 270-3 (l970). As defined by the Department, such use and occupancy "contemplates the customary seasonality of use and occupancy * * * of any land used by [the applicant]" but must be "substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use." 43 CFR 256l.0-5(a).

The land claimed by appellant was examined by Phillip D. Moreland, a Bureau of Land Management (BLM) realty specialist, on the ground on March 18, 1973, and from a plane, on June 23, l973. In a report dated November 20, l973 (Land Report at l, Exh. 5), Moreland reported finding a number of structures, including a 20- by 30-foot log cabin, in the southwest corner of the claimed land that were "owned by the Alaska Department of Fish and Game [ADFG]." Moreland found other signs of former use and occupancy, but only a sign, marking the southwestern corner of appellant's allotment, "could be traced to the applicant." Id. at 5. Based on the field examination and various interviews, including one with appellant, and letters, Moreland concluded that "though there is little doubt the applicant occasionally uses the area, he does not make actual, substantial use and

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1/ Appellant had filed a previous Native allotment application, A-52449, for the same land on June 29, l960, which had been field-examined on Mar. 2l, l96l, and Sept. 28, l963, and then finally rejected by BLM on Dec. l6, l963. Appellant did not file an appeal from the December l963 BLM decision. In connection with this previous application, appellant had alleged use and occupancy each year since l940, between Jan. l and Mar. 3l and Nov. l and Dec. 3l, for the purposes of hunting and trapping, and the construction of certain improvements, specifically a tent frame, log cabin, and fish rack, in l940. See Exhibit B.

occupancy of the site to the potential exclusion of others as required in the regulations for Native allotments." Id. Moreland stated that the land is "commonly used" by the public for sport fishing. Id. Moreland recommended rejection of appellant's application.

In a February 28, l975, decision BLM rejected appellant's application. This decision was based on the November l973 Land Report and cited the statement in John Nanalook, l7 IBLA 353, 355 (l974), that "slight and sporadic use of land * * * is neither exclusive nor substantial" within the meaning of "substantially continuous use and occupancy." The decision also found that a statement signed by several residents of Newhalen in April l974 certifying "that we have known Ira Wassillie and know that he has used and occupied the land in his Native allotment application on the North shore of Lake Iliamna since l940 for hunting, trapping and fishing" was "not sufficient to support a conclusion that the applicant has met the substantial use and occupancy requirements for those lands described in his application." The February l975 BLM decision was vacated in an April l7, l975, decision that approved appellant's application. The April l975 BLM decision stated that it was based upon additional information received from appellant on October l5 and l6, l974, that had been misfiled and discovered after the February decision and on "other information in Mr. Wassillie's case file." 2/

On May l, l979, ADFG filed a private contest complaint, pursuant to 43 CFR 4.450-3, challenging appellant's entitlement to a Native allotment. The State noted that it claimed an interest in the land under a l0-year special land use permit (No. 50-0l05-SLUP-29, Exh. 16) issued to the Department by BLM effective January l, l97l, for the purpose of conducting research on local fish resources, and had purchased a cabin constructed on the land by the Seilers under a trade and manufacturing site claim, A-56993, filed April l6, l962. The State also noted that it sought to acquire title to the land pursuant to a selection application, AA-2l680, filed November l4, l978, under the Alaska Statehood Act, P.L. No. 85-508, 72 Stat. 339 (l958). Appellant filed a timely answer to the contest complaint.

2/ On Jan. 9, l976, the Chief of BLM's Branch of Lands and Mineral Operations wrote the following in response to inquiries from ADFG about this decision:

"A review has been made of the Native allotment file. Although a decision has not yet been made, we do feel that the decision of February 28, l975, should have been vacated only for the purpose of further review and not for the purpose of approval. We have received additional responses from our District Office and your office which will all be taken into account in re-evaluating this case. We will try to take an action as soon as possible and will keep you informed of that action. We feel at this time that at least the portion with your improvements, if not all the allotment, will be rejected."

Accordingly, in response to Alaska's private contest, a hearing was conducted by Administrative Law Judge Clarke on September 23, l982, 3/ in Iliamna, Alaska, and on September 24, l982, in Anchorage, Alaska. 4/ In a June l9, l984, decision, after a lengthy summary of the evidence, Judge Clarke concluded that the State had made a prima facie showing of appellant's failure to "possess the land in question for a period of five years in a potentially exclusive way"; that appellant had "failed to preponderate" on this issue; and that the Native allotment application should be rejected. Appellant filed a timely appeal of this decision.

II. The Motion to Remand to Implement the Settlement Agreement

On September l6, l985, the parties filed a settlement agreement with the Board. The agreement was signed by a representative of the State on July 24, l985, and by appellant on August 20, l985, and requests the Board to remand the case to BLM with instructions to convey the land claimed by the State and appellant in accordance with the provisions of the agreement. "The parties deem it in the best interest of all parties and members of the public that this dispute be settled by an agreement which will avoid the expense and time delay of further appeals and be equitable to all parties," the agreement states. The agreement provides that BLM shall convey a strip of land along Lake Iliamna to the State and the remainder of the land to appellant. This division is shown on an attached aerial photograph; a legal description must await a visit by the parties, the agreement states. The State agrees to use its land only for research on and management of the local fishery resource and for public recreation, not to convey the land into private ownership, and to permit appellant to locate a cabin on appellant's land under certain conditions. Appellant agrees to dedicate a 25-foot-wide public easement in any portion of the bed of the creek and lagoon owned by him for activities associated with fishing and landing floatplanes. In the motion submitted with the agreement, appellant and the State request the Board to remand the case to BLM with instructions to implement the settlement agreement in view of the fact that the State has now "withdrawn [its] objection" to appellant obtaining a portion of his allotment. The parties cite United States v. Napouk, 6l IBLA 3l6 (l982), in support of their request.

BLM filed a response to the proposed settlement on November 2l, l985. BLM "encourages the resolution of disputes through stipulated agreements," it says. "However, BLM is concerned that * * * [it] can implement the settlement consistent with its obligation to convey land only to qualified applicants." BLM states that, if the Board approves the settlement, it should construe the settlement as a partial withdrawal by the State of its private contest and also as a partial relinquishment by appellant of his

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3/ The application was not approved under 43 U.S.C. | 1634 (1982).

4/ The testimony of two witnesses, Grenold Collins and Edwin W. Seiler, was taken by way of depositions conducted, respectively, on Sept. l3 and l6, l982, by counsel for appellant and the State in Anchorage, Alaska, and then submitted as exhibits at the Sept. 23, l982, hearing.

allotment application, which the Bureau of Indian Affairs (BIA) should approve consistent with its responsibility under a Memorandum of Understanding between BLM and BIA. BLM also states that the Board should clarify that the conditions set forth in the settlement agreement will not be included in the certificate of allotment or conveyance document and that the parties must submit a sufficient legal description of the divided parcel of land before survey.

[l] Our administrative review responsibility on behalf of the Secretary under 43 CFR 4.l is to see that the law is carried out and that no public domain is disposed of to a party who is not entitled to it. Knight v. U.S. Land Association, l42 U.S. l6l, l78, l8l (l89l); United States Fish & Wildlife Service, 72 IBLA 2ll, 220-2l (l983). Therefore, although we are ordinarily inclined to grant a motion to remand, dismiss, or withdraw an appeal when the parties involved agree on it, we will not do so where it is apparent that the law may not be carried out or land may be disposed of to a party not entitled to it. That is the situation here. After the hearing, Judge Clarke found appellant is not entitled to the land he applied for under the Native Allotment Act. We cannot grant a motion to remand this case to BLM with instructions to convey land to appellant without a de novo review of the record to determine whether Judge Clark's decision is correct. U.S. Fish & Wildlife Service, supra. Our decision in United States v. Napouk, supra, is not to the contrary. The protests that the State of Alaska withdrew in that case were based on its need for access to the lands covered by Napouk's allotment application. See 43 U.S.C. | l634(a)(5)(B) (l982). In this case Alaska's private contest was based on its belief that appellant was not entitled to the land because he did not meet the requirements for use and occupancy under the Native Allotment Act. The fact that Alaska no longer objects to appellant "attain[ing] * * * the portion of his allotment reflected in the Settlement Agreement" (Motion at 2) does not mean we may ignore whether he is entitled to it.

III. Appellant's Entitlement to a Native Allotment

As already indicated, it has been a matter of doubt from the outset whether appellant was in substantial actual possession and use of the land he applied for that was at least potentially exclusive of others for a period of 5 years. One of the pieces of new information that caused BLM in 1975 to vacate its earlier decision rejecting appellant's claim was an affidavit from appellant filed with BLM on October 16, 1974. This affidavit states:

> Around 1940 I started using this land for hunting and trapping and fishing. In 1940-42 I built the following on the land:a) Foundation for tent frame; b) Fish rack. In about 1962 I was going to build a hunting cabin down there so I would have a permanent hunting cabin. To do this I took wood for a frame down to the place. The next time I came down it wasn't there. * * * After the Seiler people built there [sic] cabin my fish rack disappeared. * * * Even now I still use this land. My use has consisted of the following: a) Trapping during the winter; b) Hunting during the winter and the fall; c) Fishing during the

> fall and especially in the winter. * * * I have used this land every year as I haven't been out of this village and the immediate region.

The other piece of new information BLM considered was a Statement of Witness for Native Allotment Application filed October 15, 1974, from Alex Wassillie, appellant's son. This statement responded to the question on the form, "What year did the applicant begin using the land?" with "he used it every [sic] since I was born." 5/ To the question, "Is the land being used by anyone else beside [sic] the applicant?" the response was "Yes * * * relatives, friends and the Fish and Game [h]as a building on it. * * * [They use it in the] spring, fall [and] winter [for] berrypicking, trapping, hunting [and] fishing." 6/

[2] Although these statements indicate use by the appellant between 1940 and 1960, the reference to use by relatives and friends raises the question whether appellant's use was potentially exclusive during that period. 7/ At the hearing appellant testified that he used this land with others from his village of Newhalen, located approximately 23 miles to the west, for herding reindeer both before and after 1940, until approximately 1943 (Tr. 167-69, 180-81). Appellant testified that he and others also used the Lower Talarik Creek area for hunting, fishing, and trapping, but only after his application was approved in 1975 did others regard the land as his and ask him for permission to use it (Tr. 169, 176-77, 181-82, 187-89). 8/

5/ Alex Wassillie was born in 1946 (Tr. 217).

6/ On the back of the statement Alex Wassillie wrote:

> "The fall of 1962 Ira Wassillie was going to building [sic] a hut. But he was in the rush to come home because of the weather. So he put the building on the beach so he could come back to Lower Talarik Creek. And he went down to fine [sic] that the building was on the all along the shore scattered. Some one else had a cabin where Ira was to build the hut on." Cf. Tr. 172, 204.

This statement and the similar statement in Ira Wassillie's affidavit make clear that appellant does not claim there was a log cabin on the land applied for, as stated in the application. The application included the reference to a log cabin because Alex Wassillie assisted his father in filling out the application and thought that the amount of land claimed would include the cabin of Ira's brother Nick that was located "in the timbers" in sec. 24 to the northeast of the land claimed in sec. 26 (Tr. 223-24). See Exh. F.

7/ The record makes clear that beginning in about 1960 the Lower Talarik Creek area, including the land included in the application, was increasingly used by visiting sport fisherman brought in by plane. See generally depositions of Grenold Collins and Edwin W. Seiler; Tr. 70-75, 130-31; Exhs. 18 and 19.

8/ In response to questions by counsel for the State of Alaska, appellant testified as follows (Tr. 181-82):

> "Did the people who owned these reindeer use the * * * Lower Talarik Creek area to hunt caribou, too?
> "Yes.

Alex Wassillie also testified that members of his extended family and other villagers went to Lower Talarik Creek to hunt and pick berries with his father and mother (Tr. 224-25, 226). Okelene Tratikoff, appellant's wife's sister, testified that the women would stay there when the men went trapping and also would go to pick berries and roots and to fish and hunt (Tr. 193). Appellant's friend Nickeenty Anelon testified he went trapping with him in Lower Talarik Creek in the mid 1940's (Tr. 198). Appellant's older brother Nick testified that he, too, herded, trapped, fished, and picked berries in the Lower Talarik Creek area (Tr. 212-14).

Related to this question is the question of whether appellant continued his use of the land claimed. Although appellant testified he constructed a tent frame made of logs "around 1940," (Tr. 171, 175, 185), and a fish rack (Tr. 171), his testimony makes clear that he used another tent frame located "up in the timber" in the stand of spruce near his brother's cabin as his principal shelter when he came to the Lower Talarik Creek area for hunting, fishing, and trapping between 1940 and 1960, and allowed the one on the land claimed in his application to deteriorate and disappear after his herding activities ceased (Tr. 171-72, 174, 180, 183-86). 9/ See also Tr. 141. Similarly, appellant's son testified that appellant "used to have a tent frame and fish rack down there" on the land claimed in appellant's application, but that it disappeared before 1960

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fn. 8 (continued)

"And did they use it to fish, too?

"They use -- they use it for fish, too.

"The entire community would use the area?

"Uh.

"Did they pick berries there?

"Yes. They pick berries there, too.

* * * * * * * "So the area was commonly used by the people who lived in the region?

"Um-hum (affirmative response)."

9/ Appellant testified as follows concerning the tent frame on the land he claimed, in response to questions from counsel for the State of Alaska and the Administrative Law Judge (Tr. 185-86):

"[Counsel for the State of Alaska]: Did you bury it?

"The -- I never bury deep. I bury by himself account of we don't use so much after we run out of reindeer.

"After you ran out of reindeer, you didn't use that tent frame?

"No.

"THE COURT: Which one did you not use, the one by the river or the . . . .

"Down by -- down by the river.

"After the reindeer were gone?

"Yes.

* * * * * * *

"[Counsel for the State of Alaska]: And do you -- is there anything that can make you remember when the caribou came that -- to drive out the reindeer, when you -- when you stopped herding the deer?

"Around 1948, I guess. It's about 1948."

(Tr. 219). 10/ This testimony is corroborated by that of the pilots, guides, and fisheries management personnel who said they saw no signs of habitation when they flew over or visited Lower Talarik Creek in 1959 and the early 1960's (Tr. 70-71, 74-75, 130-31; Deposition of Edwin W. Seiler
at 9, 23; Deposition of Grenold Collins at 11-12, 16; Exhs. 18 and 19).

On these facts we cannot find that appellant has demonstrated substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. In Mildred Sparks, 42 IBLA 155, 159 (1979), the Board stated:

> [W]here * * * there are no improvements on the site, the use was spotty, highly intermittent, and limited to food gathering, hunting, and fishing, uses which might have been done on much of the public domain in Alaska by many Natives without evidencing any possession of the land exclusive of others, and the lengthy period of nonuse demonstrates that the land has not been needed for subsistence purposes for years, it is reasonable to deny an allotment.

In that case, as in Alyeska Pipeline Co., 52 IBLA 222 (1981), the Board referred the case for a hearing to determine whether the allotment claimed had been abandoned. See Herbert H. Hilscher, 67 I.D. 410 (1960). Based on the hearing in this case we find that appellant's occupancy and use of the lands he claims were not "notorious, exclusive, and continuous, and of such a nature as to leave visible evidence thereof so as to put strangers upon notice that the land is in the use or occupancy of another, and the apparent extent thereof must be reasonably apparent," United States v. 10.95 Acres of Land in Juneau, 75 F. Supp. 841, 844 (D. Alaska 1948); see United States v. Estabrook, 94 IBLA 38, 53-54 (1986); and that he had ceased any previous qualifying use and occupancy of these lands before submitting his application, thus restoring the lands to their vacant and unappropriated status. United States v. Flynn, 53 IBLA 208, 238-39, 88 I.D. 373, 389-90 (1981). After submitting his application there is no evidence that appellant occupied the lands he claimed and his use of the lands for fishing, hunting, and trapping was not notorious, exclusive, and continuous. United States v. 10.95 Acres of Land in Juneau, supra (Tr. 255-58). Cf. Gregory Anelon, Sr., 21 IBLA 230 (1975). We conclude that appellant has not shown by a preponderance of the evidence that he is entitled to the lands described in his

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10/ In response to questions from counsel for the State of Alaska, appellant's son testified as follows (Tr. 220):

"Okay. What happened to that tent frame and fish rack?

"I don't know. Must be just rotten or somebody through [sic] it away or used for firewood.

"When did it disappear?

"The last time I remember, let's see, about 1960 I guess is when it was up or some -- earlier than that I guess. I don't know."

The Land Report states: "A digging in the sand dune about 50 yards to the east of the cabin was indicated by our guide [Alex Wassillie] as being an early dwelling belonging to Ira Wassillie" (Exh. 5 at 1).

Native allotment application. Accordingly, his application must be rejected and the motion to remand denied.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the motion to remand is denied, and the June 19, 1984, decision of the Administrative Law Judge rejecting appellant's Native allotment application is affirmed.

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Will A. Irwin
Administrative Judge

We concur:

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Bruce R. Harris
Administrative Judge

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C. Randall Grant, Jr.
Administrative Judge